Office - Supreme Court, U.S.
FILED
MAY 5 1982
ALEXANDER L. STEVAS,
CLERK

81-2176

No.

IN THE SUPREME COURT OF THE
UNITED STATES

1982 Term

People of the State of
Michigan on relation of
William L. Fisher

-v-

Robert C. Anderson,
Respondent

On appeal from the
Michigan Supreme Court

JURISDICTIONAL STATEMENT

WILLIAM L. FISHER, ESQ.
Attorney at Law
Relator, in pro per
1051 Naughton St. #202
Troy, Michigan 48084
(313) 689-8550

Is the "age discrimination clause" which has been applied to co-relator Beer in the instant case really applicable to him and, if so, is it constitutional?

People say "NO" to both parts of this question.

TABLE OF CONTENTS

	Page
Table of Authorities	i
Question Presented for Review	1
Constitutional (and implementing statutory) provision	6
Concise statement of the case	6
Statement why the question presented requires plenary consideration	11
Appendix Item I	18
Appendix Item II	19
Appendix Item III	20
Appendix Item IV	21

****

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS:

14th Amendment of Federal Constitution.....3,10,12,16,17

Clause 3, Art. VI of Federal Constitution.....2,10,11,16,17

Art. I, Sections 1, 2 and 17 of the Michigan Constitution.....10

Art. VI, Sections 13 and 22 of the Michigan Constitution.....10

STATUTES:

28 USC 1257..... 3

CASES CITED:

Allor v Wayne County Auditors 43 Mich 76.....14

Page

Chandler v Judicial Council
398 US 74; 28 LEd 2nd 100;
98 S Ct. 1648.....3

Chandler v Nash
5 Mich 409;.....14

Douvielle v Manistee Supervisors
40 Mich 585.....14

Dunham v Tilma
191 Mich 688;.....14

Gratopp v VanEps
113 Mich 590;.....14

Holland v Adams
269 Mich 372;.....14

Malmed et al. v Thornburgh et al
478 F Supp 988; ___F2d_____..,.4,5,15,16

Marbury v Madison
1 Cranch 137;.....3,4,12

Matter of Headnotes
43 Mich 641;.....14

Murgia--Massachusetts v Murgia
427 US 307, 96 S Ct 2562,
49 L Ed 2d 520 (1976).....4,5,15,16

Nichols v Judge of Superior Court
130 Mich 187.....14

People v Hurlbut
24 Mich 44;.....14

People v Wayne County Board of Auditors
13 Mich 233;.....14

Sharp v Farrell
243 Mich 246.....14

Shurburn v Hooper
40 Mich 503;.....14

Slaughter v People
2 Doug (Mich) 334.....14

Page

Streeter v Paton
7 Mich 341;.....13

Throop v Langdon
40 Mich 673;.....13

Underwood v McDuffee
15 Mich 361;.....13

Vance v Bradley
440 US 93, 99 S Ct 939
59 L Ed 2d (1979).....4,5,15

Waldby v Callendar
8 Mich 430;.....14

JURISDICTIONAL STATEMENT

Now come People and submit the following as and for their jurisdictional statement in compliance with the Rules of the U.S. Supreme Court.

The question presented by this appeal is as follows:

Is the "age discrimination clause" which has been applied to co-relator Beer in the instant case really applicable to him and, if so, is it constitutional?

People say "NO" to both parts of this question.

The caption of the case contains the names of all parties thereto except co-relator William John Beer who was made a party by due service of process of pleadings and briefs in the original action in the Michigan Court of Appeals and of pleadings and briefs in the

Michigan Supreme Court.

The lower courts issued orders (not published) but no opinions.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is as follows:

People of the State of Michigan bring this quo-warranto action against respondent for, inter alia, judgment of usurpation of the office of Oakland County Circuit Judge including ouster therefrom for holding same without warrant in law.

Co-relator Beer has a solemn federal duty imposed upon him by the federal constitution (Clause 3, Art. VI thereof), to wit: to uphold same in the discharge of his official duties as Circuit Judge for the County of Oakland, State of Michigan. Respondent Anderson usurps said office and interferes with said duties without warrant in law.

Co-relator Beer asked, to no avail, the Michigan Court of Appeals, to restore to him said office for the reason, inter alia, that he has been deprived of same without due process of law in violation of the 14th Amendment and has been illegally prevented from performing said solemn federal duty enjoined upon him by said glorious instrument.

The date of entry of the judgment sought to be reviewed is February 5, 1982 and the date the notice of appeal was mailed to the Michigan Supreme Court was May 2, 1982.

The statutory provision conferring jurisdiction of the appeal on this court is 28 USC 1257.

The cases believed to sustain jurisdiction are the following, inter alia: Marbury v Madison; Chandler v Judicial

Council; Murgia; Vance; and Malmed.

Marbury v Madison and Chandler v Judicial Council both involved a federal judicial office; the former laid down the affirmation of the ancient legal principle that a de jure title holder has a vested property right in a public office; the latter admitted, without saying so, that a fundamental right (not less than a property right protected by the federal constitution) was being decided. Said admission is by necessary implication since the dissent thought that Judge Chandler had been deprived of his office in violation of the federal constitution while the majority thought not.

The majority in Murgia and Vance decided a right to a mere employment, terminable at will, as though it were a property right without saying so; it said what it was not, to wit: "a fundamental

right". (Consonant with justice this same court which treated Murgia and Vance on their merits cannot refuse to decide the case sub judice in which not only a property right has been taken without due process but a federal duty has been interfered with without warrant in law).

Malmed had to distinguish the majority opinions of Murgia and Vance on the basis that the issue of due process was not addressed and proceeded to protect the incumbent of a state judicial office in accordance with the correct legal principle that no less than a property right is involved in the exercise and peaceful enjoyment of said office. This highest Court should leave no stone unturned to be not outdone by Malmed in protecting co-relator Beer in view of the unassailable dint of the reasoning therein.

The constitutional (and implementing statutory) provision the case involves is to the following effect:

> "No person shall be elected or appointed to a judicial office after reaching the age of 70 years." Constitution of the State of Michigan of 1963, Art. VI, Sec. 19.

A concise statement of the case containing the facts material to consideration of the question presented is as follows: On or about January 23, 1981 the People of the State of Michigan on relation of William L. Fisher commenced an original action in quo-warranto by and for the People in the Michigan Court of Appeals showing, inter alia, as follows:

Relator is an interested citizen of Michigan and of the United States of America and a resident of Oakland County. On or about January 16, 198 relator made application to Attorney General

Frank J. Kelley to bring an action in quo warranto against Robert C. Anderson who usurps the office of Oakland County Circuit Judge by his pretended election to an alleged vacancy and, without warrant in law, holds the same against the de jure claim of William J. Beer who has not vacated, resigned or been removed from said office.

Attorney General Frank J. Kelley declined to bring said action on January 23, 1981.

Relator sought leave in the Court of Appeals to bring the action in view of the declination made to relator of said Attorney General Frank J. Kelley.

Co-relator Be[illegible] was Oakland County Circuit Judge since 1958 and now holds over from his last term in office which expired January 1, 1981.

Sometime in 1980 respondent Anderson assumed the risk of pretending to succeed co-relator Beer in said office knowing

that there was no vacancy therein and took it upon himself to become a candidate in the August 1980 primary election knowing also that co-relator Beer's exclusion therefrom was wrongful.

Respondent Anderson pretended to become elected to said office in the ensuing November 1980 general election and pretended to become qualified therefor and pretended to assume said office on January 1, 1981; said Anderson never defeated incumbent Beer in said election or in any other election. Respondent Anderson wrongfully holds said office de facto without warrant in law and against the good and valid de jure claim of co-relator Beer.

On April 28, 1981 the Michigan Court of Appeals denied leave to bring said action and on June 4, 1981 denied rehearing of its said order.

On February 5, 1982 the Michigan Supreme Court denied leave to appeal from the April 28, 1981 order of the Michigan Court of Appeals.

The stage in the proceedings at which the question sought to be reviewed was raised was the very first stage in the court of first instance, to wit: in said original complaint in the Michigan Court of Appeals and was the very first stage in the appellate court, to wit: in People's application for leave to appeal in the Michigan Supreme Court.

The manner of raising said question was by asserting same in said original complaint and arguing same in the supporting brief (likewise for application for leave to appeal and supporting brief). The assertion in said original complaint was as follows:

Said board (state board of election

canvassers) acted improperly by mistakenly applying the last sectence of Section 19 (herein "age discrimination clause") of Art. VI of the 1963 Michigan Constitution to co-relator Beer whereas the same has no application to him whatsoever.

Even if applicable, said "age discrimination clause" and any statute in implementation thereof are invidiously discriminatory against co-relator Beer and unconstitutionally violative of his precious rights and solemn duties under both the federal and state constitutions including, in respect to the former, Clause 3 Article VI and the 14th Amendment thereof and, in respect to the latter, Article I, Sections 1, 2 and 17 and Article VI, Sections 13 and 22 thereof.

Both courts refused to give co-relator Beer his "day in court" in that the court of first instance denied him

leave to file his quo-warranto complaint and the appellate court denied him leave to appeal.

A Michigan Circuit Judge who is required under Clause 3, Art. VI of the federal constitution to carry out a federal duty, to wit: uphold and defend the federal constitution, has been illegally barred from the performance of said duty, to wit: he has been deprived of his office without due process of law.

A statement of the reasons, inter alia, why the question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument for its resolution is as follows:

Respectfully, the decisions of the United States Supreme Court, are mutually conflicting and confusing in respect to the question of whether a public office

is property within the meaning of the 14th Amendment of the federal constitution.

If, in the course of its decisions over the years, the United States Supreme Court had held fast to traditional legal principles its hortations on the question could have been limpid expositions as witness that in Marbury v Madison 1 Cranch 137. Chief Justice Marshall speaking for a unanimous court emphatically affirmed the unerring ancient legal principle that a public office is indeed property (and far more than that) and that to withhold same from the de jure title holder is "an act deemed violative of a vested legal right".

The highest courts of the several states so teach without exception as conclusively testified to by their continued use of the venerable and ancient writ of quo-warranto; otherwise, the latter would have no meaning or

purpose. On the other hand, the very essence of quo-warranto is to test the legal title to the most important and sacred property known to the law of the land, to wit: a public office.

Witness the following expounders of this legal principle from the fathers of the law as handed down to us by an unbroken line of legal precedents from statehood of the very state from whence the case sub judice arises:

A public office, as distinct from a mere employment, embraces the idea of tenure, duration, emolument and duties. It is where, for the time being, a portion of the sovereignity attaches to be exercised for the public good. Underwood v McDuffee 15 Mich 361; Throop v Langdon 40 Mich 673; Streeter v Paton 7 Mich 341. A public officer, unlike a mere employee, has a property right in his office of which he cannot be deprived except by

due process of law. An unbroken line of authorities since statehood so far establishes our constitutional polity toward an incumbent judge and the tenure accorded him in the enjoyment of his office as to militate against any forced retirement. Slaughter v People 2 Doug (Mich) 334; Chandler v Nash 5 Mich 409; Waldby v Callendar 8 Mich 430; People v Wayne County Board of Auditors 13 Mich 233; People v Hurlbut 24 Mich 44; Shurburn v Hooper 40 Mich 503; Douvielle v Manistee Supervisors 40 Mich 585; Allor v Wayne County Auditors 43 Mich 76; Matter of Headnotes 43 Mich 641; Gratopp v VanEps 113 Mich 590; Nichols v Judge of Superior Court 130 Mich 187; Dunham v Tilma 191 Mich 688; Sharp v Farrell 243 Mich 246; Holland v Adams 269 Mich 372.

It appears that the case at bar is one of first impression in this court as relator was unable to find a single

case in the history of this court where a quo-warranto action involving a state judicial office has been appealed thereto! In the case sub judice the People had challenged said age discrimination clause (Art. VI, Sec. 19 of the Michigan Constitution and implementing statute) on the ground of its being repugnant to the Constitution of the United States and the decision of the lower courts is, in legal effect, in favor of its validity.

A lower federal court (Malmed) properly acted to protect the legal rights of an incumbent state court judge before he was actually deprived of his office. Said court, however, had to distinguish the majority opinions in Murgia and Vance . These reached this court and were treated on their merits though they did not involve, as does the case at bar, a "fundamental right" but rather a mere employment, terminable at will.

A fortiorari, should the instant case be decided by this court on its merits since it involves not only a property right protected by the 14th Amendment but an office expressly "touched" by the federal constitution (Clause 3, Art. VI).

The judge in the Malmed case obviously had wished the perspicacious observation of Justice Marshall had carried the day in Murgia; his (Marshall's) words (paraphrased) were particularly apt in the Murgia case; likewise in the instant case, to wit:

> "To force retire an able judge during his good behavior is irrational". (emphasis supplied)

What is "irrational" is ipso facto unconstitutional and hence where, as in the case at bar, a state judicial public office is usurped as a consequence of an "irrational" provision in a state constitution (and implementing statute) the de jure title holder thereof, as an

absolute minimum, has been deprived of property (and much more) without due process of law in violation of the 14th Amendment and has been impeded in the performance of duties expressly enjoined upon him by Clause 3, Art. VI. In fact, the "irrational" acts in furtherance of the "irrational" provision are deemed quasi-criminal in nature which is why the instant action is prosecuted in the name of the People of the State of Michigan. (assuming, arguendo, said clause is even applicable--unlike Malmed it is not)

Wherefore, People have a federal statutory right of appeal (Sec. 1257) which nobody can deny. This court's unrelenting commitment to do justice demands,as a minimum, reversal, if only for a decision on the merits by the lower court of the question presented for review.

Respectfully submitted,

William L. Fisher, Esq.
Attorney at Law; Relator in pro per

Appendix - Item I

COURT OF APPEALS OF THE STATE OF MICHIGAN

At a session etc.

Present Hon. Walsh, Burns, and Holbrook.

No. 55826

ORDER

In this cause an application for leave to bring an action in the nature of quo warranto, pursuant to GCR 1963, 715.2(4) and 715.1(1), is filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented. Defendant may recover costs pursuant to GCR 1963 822.

Order entered April 28, 1981.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 28th day of April in the year of our Lord, 1981.

Ronald L. Dzierbicki, Clerk

Appendix - Item II

COURT OF APPEALS OF THE STATE OF MICHIGAN

At a session, etc.

Present Hon. Walsh, Burns, and Holbrook.

No. 55826

ORDER

In this cause an application for rehearing is filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED.

Order entered June 4, 1981.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals to the order entered in said court in said cause at Lansing, this 4th day of June, in the year of our Lord, 1981.

Ronald L. Dzierbicki, Clerk

Appendix - Item III

SUPREME COURT OF MICHIGAN

At a session, etc.

Present Hon. Coleman
Kavanagh
Williams
Levin
Fitzgerald
Ryan
Moody

No. 67402

ORDER

On order of the Court, the application in propria persona for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

Order entered February 5, 1982.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of February, in the year of our Lord, 1982.

Corbin R. Davis, Deputy Clerk

Appendix - Item IV

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN on relation of WILLIAM L. FISHER,

No. 67402

-v-

ROBERT C. ANDERSON,
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM A FINAL ORDER OF THE MICHIGAN SUPREME COURT

People of the State of Michigan hereby appeal to the Supreme Court of the United States from the final order denying leave to appeal entered in this action on the 5th day of February, A.D. 1982.

Respectfully submitted,

WILLIAM L. FISHER, ESQ.
Attorney at Law
Relator in pro per
1051 Naughton St. #202
Troy, Michigan 48084

DATED: This 2nd day of May, A.D. 1982.

Office - Supreme Court, U.S.
FILED
JUL 8
ALEXANDER L. STEVAS,
CLERK

No. 81-2176

IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF MICHIGAN
on relation of WILLIAM L. FISHER,
Appellant,
v.
ROBERT C. ANDERSON,
Appellee.

On Appeal from the Michigan Supreme Court

MOTION TO DISMISS AND BRIEF IN SUPPORT

OAKLAND COUNTY CIVIL COUNSEL
Linda E. Wasielewski, Assistant
1200 North Telegraph Road
Pontiac, Michigan 48053
Attorney for,
Robert C. Anderson, Appellee

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-6788

No. 81-2176

IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF MICHIGAN
on relation of WILLIAM L. FISHER,
Appellant,
v.
ROBERT C. ANDERSON,
Appellee.

On Appeal from the Michigan Supreme Court

MOTION TO DISMISS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Appellee, Robert C. Anderson, Judge for the Sixth Judicial Circuit of the State of Michigan, located in the County of Oakland, State of Michigan, and respectfully moves this Honorable Court, pursuant to Rule 16(1)(b) of the Rules of the United States Supreme Court, to Dismiss the Appeal filed in this cause and to

Affirm the Decision of the Supreme Court of the State of Michigan. Appellant, in support of his Motion, sets forth the reasons below.

Appellant, William L. Fisher, challenges MICH. CONST. 1963, art. VI, § 19, which prohibits election or appointment to a judicial office after reaching the age of seventy (70) years, on the basis that this provision constitutes age discrimination and is hence a violation of William J. Beer's, former Judge of the Sixth Circuit for the State of Michigan, constitutional rights as protected by MICH. CONST. 1963, art. I, § 2, and U.S. CONST. amend. XIV. The Michigan Court of Appeals and the Michigan Supreme Court denied Appellant's challenge.

The issues raised in this Appeal do not present a substantial federal question as this Court has recently spoken on the issue of mandatory retirement as it relates to age discrimination in the cases of *Massachusetts v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976) and *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979).

The issues raised in this Appeal do not present a substantial federal question as this controversy was previously presented to this Court: *Beer v. Austin*, 449 U.S. 802, 101 S. Ct. 46 (1980), which was dismissed for want of a federal question on October 6, 1980. The prohibition of William J. Beer to seek re-election to the position of Judge of the Sixth Judicial Circuit of Michigan, due to MICH. CONST. 1963, art. VI, § 19, was challenged in both *Beer v. Austin*, and the case now before this Court. The legal issues are identical in both cases.

WHEREFORE, Appellee, Robert C. Anderson, prays this Honorable Court Dismiss this Appeal for want of a substantial federal question and Affirm the Decisions of the Michigan Supreme Court and the Michigan Court of Appeals.

Respectfully submitted,

Oakland County Civil Counsel

By: Linda E. Wasielewski, Assistant
1200 North Telegraph Road
Pontiac, Michigan 48053
Attorney for
Robert C. Anderson, Appellee

ISSUE PRESENTED

THE INSTANT APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION, AS THE ISSUE OF MANDATORY RETIREMENT AS IT RELATES TO AGE DISCRIMINATION HAS BEEN PREVIOUSLY DECIDED BY THIS COURT.

TABLE OF CONTENTS

	Page
Issue Presented	i
Table of Authorities	iv
Statement of Facts	1
Argument	
The Instant Appeal Does Not Present A Substantial Federal Question, As The Issue Of Mandatory Retirement As It Relates To Age Discrimination Has Been Previously Decided By This Court	3
Conclusion	6
Appendix	
Michigan Court of Appeals Order: May 9, 1980	A-1
Michigan Supreme Court Order: June 19, 1980	A-2
Michigan Court of Appeals Order: April 28, 1981	A-3
Michigan Court of Appeals Order: June 4, 1981	A-4
Michigan Supreme Court Order: February 9, 1982	A-5

TABLE OF AUTHORITIES

Page

Cases

Beer v. Austin, 449 U.S. 802, 101 S. Ct. 46 (1980) 2,5

Malmed, et al. v. Thornburg, et al., 478 F Supp 998, 621 F2d 998 (1980) 4

Massachusetts v. Murgia, 427 U.S. 307, 96 S. Ct. 2562 (1976) 4

Rubino v. Ghezzi, 512 F2d 431 (2nd Cir 1975) .. 4

Trafelet v Thompson, 594 F2d 623 (7th Cir 1979) 4

Vance v. Bradley, 440 U.S. 93, 99 S. Ct. 939 (1979) 4

Constitutional Provisions

MICH. CONST. 1963, art. VI, § 12 5,6

MICH. CONST. 1963, art. VI, § 19 2-5

No. 81-2176

IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF MICHIGAN
on relation of WILLIAM L. FISHER,
Appellant,
v.
ROBERT C. ANDERSON,
Appellee.

On Appeal from the Michigan Supreme Court

BRIEF IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF FACTS

William J. Beer filed his Affidavit of Candidacy for re-election to the Sixth Judicial Circuit Court of the State of Michigan in and for the County of Oakland on or about March 17, 1980. The Affidavit was rejected by the Director of the Michigan State Board of Elections on March 20, 1980, as Beer was over the constitutionally set age limit of 70 years.

Beer challenged the constitutionality of MICH. CONST. 1963, art. VI, § 19, in a Complaint for Mandamus filed April 1, 1980, in the Court of Appeals. (*Beer v. Austin*, Docket No. 50818) The Complaint was dismissed on May 29, 1980, as lacking merit. (A. 1). Leave to Appeal was filed in the Michigan Supreme Court. (*Beer v. Austin*, Docket No. 65259) Leave to Appeal was denied by the Michigan Supreme Court on June 19, 1980, (A. 2). The United States Supreme Court dismissed the Appeal filed therein on October 6, 1980, for want of federal question, *Beer v. Austin*, 449 U.S 802, 101 S. Ct. 46 (1980). As a result, thereof, Beer's name did not appear on the primary election or general election ballots. His term of office expired on January 1, 1981.

Judge Robert C. Anderson successfully ran in the primary (August, 1980) and general (November, 1980) elections. He was qualified and assumed office on January 1, 1981, as Beer's successor to the vacant judicial seat.

Appellant filed the instant cause in the Michigan Court of Appeals on January 23, 1981, asserting that Beer holds over in his judicial office and that Judge Anderson usurps said judicial office. Appellant's Application for Quo Warranto was denied for lack of merit by the Michigan Court of Appeals in an Order dated April 21, 1981, (A. 3).

On May 12, 1981, Appellant filed a motion for Rehearing and/or Reconsideration before the Michigan Court of Appeals. Said Motion was denied on June 3, 1981, (A. 4). Appellant filed an Application for Leave to Appeal to the Michigan Supreme Court on June 10, 1981. Leave to Appeal was denied by the Michigan Supreme Court on February 5, 1982, (A. 5).

On May 2, 1982, Appellant filed Notice of Appeal with this Honorable Court. To Appellant's Appeal, Appellee, Robert C. Anderson, herein responds.

ARGUMENT

Appellee prays for entry of an Order of Dismissal of this Appeal and an Order Affirming the Orders entered below by the Michigan Court of Appeals and the Michigan Supreme Court pursuant to Rule 13(1)(b) of the Court. The matter presented herein does not present a substantial federal question as the issue of mandatory retirement as it relates to age discrimination has been decided by this Court, both generally and as it relates to William J. Beer.

William J. Beer filed his Affidavit of Candidacy for re-election to the Circuit Court for the County of Oakland on or about March 17, 1980. The Affidavit was rejected on March 20, 1980, by the Director of the State Board of Election as Beer was over the constitutionally set age limit.

MICH. CONST. 1963, art. VI, § 19, provides in relevant part:

> "No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

Beer challenged the constitutionality of this provision in a Complaint for Mandamus filed in the Michigan Court of Appeals on or about April 1, 1980; *Beer, et al. v. Austin, et al.*, Docket No. 50818.

The two legal bases upon which the challenged relied were:

> (1) That MICH. CONST. 1963, art. VI, § 19, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by creating an irrebuttable presumption of unfitness for judicial office.

(2) That MICH. CONST. 1963, art. VI, § 19, is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The case law in this area is clear. The irrebuttable presumption theory has been rejected in cases dealing with mandatory retirement. *Malmed, et al v. Thornburgh, et al.*, 478 F Supp 998, 621 F2d 998, (1980); *Massachusetts v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976); *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979); *Trafelet v. Thompson*, 594 F2d 623 (7th Cir 1979); *Rubino v. Ghezzi*, 512 F2d 431 (2nd Cir 1975).

With respect to the Equal Protection argument, it has been held that age is not a suspect class and that the right to employment is not fundamental. *Trafelet v. Thompson*, 594 F2d 623. Therefore, such a challenge is weighed by the "rational basis test"; to-wit, if the state can show a rational basis for the law it is not violative of the Equal Protection Clause of the federal constitution. Mandatory retirement provisions have withstood this limited scrutiny. *Massachusetts v. Murgia*, 427 U.S. 307; *Vance v. Bradley*, 440 U.S. 93.

The provision in question, MICH. CONST. 1963, art. VI, § 19, thus being unchallengable along federal constitutional bases, Beer's Complaint for Mandamus was dismissed on May 29, 1980, by the Michigan Court of Appeals as lacking in merit, (A. 1).

That decision was next submitted to the Michigan Supreme Court (Docket No. 65259) which denied Leave to Appeal on June 19, 1980, (A. 2).

Finally, this issue was submitted to the United States Supreme Court, which dismissed the Appeal for want of a federal question, on October 6, 1980. *Beer v. Austin*, 449 U.S. 802, 101 S. Ct. 46 (1980).

The decisions in *Beer v. Austin*, are dispositive as to the case at bar. Beer's Affidavit of Candidacy was rightfully rejected pursuant to MICH. CONST. 1963, art. VI, § 19, which stands as constitutional. Beer's name did not, therefore, appear on the primary or general election ballot, and as a result, his term of office expired on January 1, 1981.

Appellee herein, Robert C. Anderson, successfully ran for the vacant judicial seat in the primary election in August of 1980, and the general election of November, 1980. He was duly qualified and assumed office on January 1, 1981, as Beer's successor.

Appellant, William L. Fisher, subsequently filed an Action for Quo Warranto alleging *inter alia* that William J. Beer holds over his judicial office and that Appellee, Robert C. Anderson, usurps said judicial office and pretends to hold the same.

MICH. CONST. 1963, art. VI, § 12, states in relevant part:

> "Circuit Court judges shall be nominated and elected at non-partisan elections in the circuit in which they reside, and shall hold office for a term of six years and until their successors are elected and qualified . . ."

As is emphasized above, Beer filed his Affidavit, which was properly rejected pursuant to MICH. CONST.

1963, art. VI, § 19. His name did not appear upon either the primary election or general election ballots. His term was completed on January 1, 1981.

Judge Anderson was elected and qualified and assumed office on January 1, 1981, pursuant to MICH. CONST. 1963, art. VI, § 12. He rightfully holds his position of Oakland County Circuit Court Judge until January 1, 1987.

As Judge Anderson rightfully holds his judicial office and does not usurp the same, the Michigan Court of Appeals and the Michigan Supreme Court rightfully dismissed Appellant's cause of action. As William J. Beer previously litigated this issue, it cannot be said that he was not granted his day in court.

The question having been previously raised and determined, this case does not present a substantial federal question in need of review.

CONCLUSION

The Appeal should be Dismissed as lacking a substantial federal question, and the decisions of the Michigan Court of Appeals and the Michigan Supreme Court should be Affirmed.

Respectfully submitted,

OAKLAND COUNTY CIVIL COUNSEL

By: Linda E. Wasielewski, Assistant
1200 North Telegraph Road
Pontiac, Michigan 48053
Attorney for,
Robert C. Anderson, Appellee

ORDER

(State of Michigan — Court of Appeals)
(May 9, 1980)

(The Honorable William John Beer, Thomas Plunkett, Barry Yaker, Frances R. Avadenka, and Warren Newton, Plaintiffs, v Secretary of State of the State of Michigan, Oakland County Board of Election Comisssioners and Members thereof, Michigan State Board of Canvassers, its Secretary and Members thereof, Oakland County Board of Canvassers and Members thereof, and Director, Board of Elections, Defendants. No. 50818)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Grand Rapids, on the thirtieth day of April in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Daniel F. Walsh, Presiding Judge. Robert B. Burns, Donald E. Holbrook, Jr., Judges.

In this cause a complaint for mandamus and motion for order to show cause are filed by plaintiffs, and an answer in opposition thereto together with a motion for extension of time in which to file brief and a motion for immediate consideration of the motion for extension of time having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for order to show cause be, and the same is hereby DENIED for lack of merit in the grounds presented.

IT IS FURTHER ORDERED that the complaint for mandamus be, and the same is hereby DISMISSED.

IT IS FURTHER ORDERED that the motion for extension of time in which to file brief and motion for immediate consideration of the motion for extension of time be, and the same are hereby DENIED as moot.

(Certification omitted)

ORDER

(State of Michigan — Supreme Court)

(June 19, 1980)

(The Honorable William John Beer, *et al.*, Plaintiffs-Appellants, v Secretary of State of the State of Michigan, *et al.*, Defendants-Appellees. SC: 65259)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of June in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the plaintiffs-appellants' motion for immediate consideration is considered, and it is GRANTED.

The application for leave to appeal is also considered, and it is DENIED, becausee the Court is not persuaded that the questions presented should be reviewed by this Court.

Kavanagh, and Moody, JJ., would grant leave to appeal.

Williams, J., not participating.

(Certification omitted)

ORDER

(State of Michian — Court of Appeals)

(April 28, 1981)

(William L. Fisher, Plaintiff, v Oakland Circuit Judge, Defendant. No. 55826)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Lansing, on the twenty first day of April in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable Daniel F. Walsh, Presiding Judge, Robert B. Burns, Donald E. Holbrook, Jr., Judges.

In this cause an application for leave to bring an action in the nature of quo warranto, pursuant to GCR 1963, 715.2(4) and 715.1(1), is filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented. Defendant may recover costs pursuant to GCR 1963, 822.

(Certification omitted)

ORDER

(State of Michigan — Court of Appeals)

(June 4, 1981)

William L. Fisher, Plaintiff, v Oakland Circuit Judge, Defendant. No. 55826)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Grand Rapids, on the third day of June in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable Daniel F. Walsh, Presiding Judge, Robert B. Burns, Donald E. Holbrook, Jr., Judges.

In this cause an application for rehearing is filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED.

(Certification omitted)

ORDER

(State of Michigan — Supreme Court)
(February 5, 1982)

William L. Fisher, Plaintiff-Appellant, v Oakland Circuit Judge, Defendant-Appellee. SC: 67402)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 5th day of February in the year of our Lord one thousand nine hundred and eighty two.

Present the Honorable Mary S. Coleman Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application *in propria persona* for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

(Certification omitted)

Office - Supreme Court, U.S.
FILED
JUL 19
ALEXANDER L. STEVAS
CLERK

No. 81-2178

IN THE SUPREME COURT OF THE

UNITED STATES

1982 Term

People of the State of
Michigan on relation of
William L. Fisher,

Appellant

-v-

Robert C. Anderson,

Respondent-Appellee

On appeal from the
Michigan Supreme Court

BRIEF OPPOSING RESPONDENT ANDERSON'S MOTION TO DISMISS

WILLIAM L. FISHER, Esq.
Attorney at Law
Relator, in pro per
1051 Naughton St. #202
Troy, Michigan 48084
(313)-689-8550

TABLE OF CONTENTS

Page

Argument Section I

The lower court orders appealed from rest on no adequate basis (federal or non-federal) 1

Argument Section II

Co-relator Beer has never had his "day in court" though he has been before five courts (including this Court) and is now (presently) before the sixth --this Court, but in a quo warranto action this time; the prior mandamous action of Beer et al v Austin et al was dispositive of nothing 3

Argument Section III

Murgia and Vance, relied upon respondent Anderson, to show want of a federal question show just the opposite; if they presented substantial federal questions for this Court to speak on age discrimination, then, a fortiorari, does the case at hand 7

Argument Section IV

Respondent Anderson's said Motion to Dismiss contains many errors and misstatements which appear to be made to mislead and deceive 10

Page

Argument Section V-

Respondent Anderson's said Motion to Dismiss should be stricken for being out of season and in violation of Michigan law 13

TABLE OF AUTHORITIES

Constitutional Provisions

MICH. CONST., art. XI, Sec 17. 2

MICH. CONST., art. II, Sec 12. 2

MICH. CONST., art. VI, Sec 19. 3

MICH. CONST., art. VI, Sec 19. 11

MICH. CONST., art. IV, Sec 30. 14

FED. CONST., art. VI, Clause 3 . . 4,8,9

Statutes

28 USC 1257 6

Cases cited

Bosworth v Terminal Railway Association (C. A. 7) 80 Fed. 969 (1897) 14

Murgia and Vance 7
(See Jurisdictional Statement)

Page

Shoultz v McPheeters,
79 Indiana 373 (1881) 9

Streeter v Paton,
7 Michigan 341 8

Throop v Langdon,
40 Michigan 673 8

Underwood v McDuffee,
15 Michigan 361 8

BRIEF OPPOSING RESPONDENT ANDERSON'S MOTION TO DISMISS

Now come People and submit the following as and for their Brief Opposing said Motion to Dismiss.

Argument Section I

Much of respondent Anderson's said Motion is devoted to showing how, upon the merits of the case, he (respondent Anderson) is not the usurper, as charged in the instant quo warranto action, but, supposedly, rightfully holds the office in question. Nearly masked in all his words are fatal flaws in logic bringing to mind the adage:

> "Words are like leaves; and where they most abound,
> Much fruit of sense beneath is rarely found."
> Essay on Critiscism --Pope

Respondent Anderson says that in August 1980, co-relator Beer's office was "vacant" for he (respondent Anderson) "ran for the vacant judicial seat in the primary

election in August of 1980" (emphasis supplied; p. 5 lines 12 and 13). On the same page (page 5 lines 10 and 11) he says that co-relator Beer's "term of office expired on January 1, 1981."

How possibly could co-relator Beer's term of office expire on January 1, 1981 when his office was "vacant" in August 1980?

How possibly could respondent Anderson say that co-relator Beer's office was "vacant" when the Michigan Constitution (Art. XI -Sec. 17) requires impeachment proceedings to remove a judge from office and then only "for corrupt conduct or for crimes or misdemeanors"?

How possibly could respondent Anderson consider himself co-relator Beer's successor in office when he never defeated co-relator Beer in the 1980 elections or in any other election?

Yet the Michigan Constitution (Art. II -Sec. 12) says that co-relator Beer's

term of office does not expire until his successor is "elected and qualified".

How possibly could respondent Anderson say that said "age discrimination clause" (Michigan Constitution Art. VI Sec. 19) applies to co-relator Beer when it is merely a one-time (not a continuing) requirement which co-relator Beer met over twenty years ago when first he was appointed to the Oakland County Circuit Court bench in 1958?

Assuming, arguendo, that said "age discrimination clause" is a continuing requirement so as to apply to co-relator Beer in 1980, it is invidiously discriminatory against him and deprives him of his property right to the office in question without due process in violation of the Federal constitution including the 14th Amendment thereof; more than this, it illegally interferes with co-relator Beer's performance of the solemn federal duty expressly en-

joined upon him by Clause 3 Art. VI thereof.

On the merits of the case, it can be shown conclusively that

(a) co-relator Beer's "judicial seat" was never vacant, that

(b) respondent Anderson is not co-relator Beer's successor in office, that

(c) co-relator Beer's term of office has yet to expire (since he holds over until his successor is "elected and qualified"), and

(d) respondent Anderson usurps the office in question without warrant in law and interferes with co-relator Beer's performance of his duties including the federal duty enjoined upon him by Clause 3 Art. VI of the Federal constitution.

Argument Section II

Though co-relator Beer has never had his "day in court" upon the merits of the case, respondent Anderson, via said Motion to dismiss, unjustly, seeks to perpetuate

this injustice. He has the unmitigated gall to say that the "decisions in Beer et al v Austin et al are dispositive as to the case at bar", whereas Beer et al v Austin et al was dispositive of nothing; moreover, he (respondent Anderson) was not even a party to Beer et al v Austin et al.

This Court exercised its discretion and denied certiorari in Beer et al v Austin et al which was too bad because, if it hadn't, there would be no respondent Anderson usurping co-relator Beer's office! The two Michigan state courts (Supreme Court and the Court of Appeals) exercised their discretion and refused to decide Beer et al v Austin et al on the merits. Beer et al v Austin et al was for mandamus in the nature of a declaratory judgment action against the Michigan Secretary of State Austin seeking to correct his conduct in wrongfully preventing co-relator Beer from running to succeed himself in

the 1980 elections.

This Court (the sixth before whom co-relator Beer has appeared before) now has a quo warranto action before it upon appeal as of right (28 USC 1257) and, as a party for the very first time, respondent Anderson who usurps the office in question. In the case sub judice, the two Michigan courts (Supreme Court and the Court of Appeals) exercised their discretion and refused to decide same on the merits.

Thus, co-relator Beer has been before five courts (including this Court) who have all exercised their discretion to deny deciding the controversy on its merits! Respondent Anderson is guilty of playing a cruel joke upon co-relator Beer by asking this Court to deny the People of the State of Michigan their statutory right of appeal under said Sec. 1257!

In the case at hand, the People only

want what, in justice, they deserve, to wit: a decision on the merits of the controversy presented; if not from this Court, then from the Michigan state courts where the case originated. This Court has it within its power to remand the case to the Michigan state courts for a decision on the merits.

Argument Section III

Respondent Anderson says that this Court "has recently (sic: 3 yrs. ago?) spoken" (first p. 2, lines 15 and 16) on the issue of age discrimination in Murgia and Vance as though this Court speaks once forever and for all!

If Murgia and Vance presented substantial federal questions for this Court "to speak" on age discrimination, then, a fortiorari, does the case at hand!

Murgia and Vance involved mere employments, whereas the case sub judice involves a "fundamental right", to wit: the most important and sacred property known to

the law of the land, to wit: title to a public office. More than that, the public office in question is a judicial office where, for the time being, a portion of the sovereignity attaches to be exercised for the public good. Underwood v McDuffee 15 Mich 361; Throop v Langdon 40 Mich 673; Streeter v Paton 7 Mich 341. The portion of the sovereignity attaching to said judicial office includes, without question, to a certain extent[1], at least, the federal government. After all, the originating source of co-relator Beer's power to uphold the federal constitution in the discharge of his duties is none other than the federal government! This duty is expressly enjoined upon him by the federal constitution itself (Clause 3 Art. VI) and

---

1. though, concededly, not to a dominant extent, as in the case of a federal judicial office; but, nevertheless, to such a significant and vital extent as to involve a substantial federal question, indubitably.

consequently is first, foremost and exclusively a federal duty; co-relator Beer's ability to carry out said duty to uphold the federal constitution is made possible in the first instance by the federal government.

Of all of the state officers enumerated in said Clause 3 Art. VI, the "Judicial Officers" alone are themselves an emanation of the perogative of the federal government.

The following quotations paraphrased to fit the case at bar which were cited with approval by Chief Justice Elliott in Schoultz v McPheeters 79 Indiana 373 (1881) illustrate this principle:

> "The one common and essential feature in all courts is a judge, or judges, so essential, indeed, that they are even called the court."

> "In these courts the sovereign (in this case the federal government to the certain and vital extent shown) is supposed in contemplation of law to be always present

(where co-relator Beer holds court); or at least is there (where co-relator Beer holds court) represented by the judges (co-relator Beer's in this case), whose power (co-lator Beer in this case) is but an emanation of the per-ogative (of the federal gov-ernment insofar as concerns co-relator Honorable William J. Beer's federal duty of upholding the federal con-stitution)".

Argument Section IV

Respondent Anderson's said Motion contains many errors and misstatements which appear to be made to mislead and deceive.

(a) Respondent Anderson repeated-ly refers to himself as "Judge Anderson" and to co-relator Beer as "former Judge", whereas, rightfully, this is the ultimate issue in the case sub judice. Respondent Anderson's self-styled references are in-excusable in view of his wrongfully holding the office in question, defacto, without warrant in law against co-relator Beer's

valid claim, de jure, to the title to said office and there being no adjudication on the merits whatsoever as to the issue at hand.

(b) Respondent Anderson refers to co-relator Fisher as Appellant. Co-relator Fisher first had to receive from the Michigan Attorney General his declination to bring the instant quo warranto action before he (co-relator Fisher) could bring same in the name of the People of the State of Michigan. The people are vitally interested in testing, by what warrant in law, respondent Anderson holds the office in question and are the Appellant[2] in this case.

(c) Appellant is said to challenge the "age discrimination" clause of Sec. 19 Art. VI of the Michigan Constitution on the basis of unlawful age discrimina-

2. In this connection, this court's clerk Stevas improperly entitled (over Appellant's objection) the case sub judice, to wit: making Appellant other than People of the State of Michigan.

tion which is true but not the whole truth; the "age discrimination" clause of Sec. 19 is also challenged on the basis that it has no application whatsoever to co-relator Beer since it is a one time requirement which co-relator Beer met in 1958 when he was first appointed to the Oakland County Circuit Court bench.

(d) The Michigan Court of Appeals and the Michigan Supreme Court are said to have "denied Appellant's challenge" but this is false; both courts denied leave to have the merits of "Appellant's challenge" heard which is a far cry from denying Appellant's challenge! Co-relator Beer has been denied his "day in court" by the Michigan State courts on his claim that he has been deprived of his property right in his public office without due process of law in violation of both the state and federal constitutions.

Argument Section V

Respondent Anderson's said Motion should be stricken for being filed out of season and in violation of fundamental justice including Michigan law.

(a) The Court's Clerk Stevas wrongfully granted Respondent Anderson's untimely request for extension of time, whereupon Appellant asked him to submit his action to a Justice or the Court for review and rectification (Rule 29.4). As of this writing Appellant has received no word from the Clerk; in any event, Appellant has preserved the issue for the full Court when it hears the instant ap-appeal.

(b) Oakland County Civil Counsel has taken it upon itself the role of interloper in the case sub judice, to wit; to represent respondent Anderson in his private matter of defending against a charge of usurping a public office without warrant in law. In the process, Oakland County

Civil Counsel has appropriated public money (so scarce and hard-earned these days) for this private purpose in manifest violation of fundamental justice including the Michigan Constitution (Art. IV -Sec. 30).

Oakland County Civil Counsel's duty in the instant quo warranto action requiring resolution of the conflicting claims of co-relator Beer and respondent Anderson to title to a public office is clear and cogent, to wit: to remain strictly neutral. This is only fair and expected and demanded upon both sound principle and solid reason. Circuit Judge Jenkins in Bosworth v Terminal Railway Association (C.A. 7) 80 Fed 969 (1897) cited authority and stated ample reason for this conclusion when speaking of similar duties of a receiver appointed in a mortgage foreclosure case:

> "But he has not the right of appeal from a decree declaring the respective equities

> of parties to the suit. He should therein be indifferent, and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another." Bosworth v Terminal Railway Association, supra.

How can this Court countenance such conduct by giving ear to said Motion to Dismiss?

WHEREFORE, said Motion to Dismiss should be stricken or denied and the case set down for hearing on the merits with jurisdiction noted as certain or, alternatively, the case should be summarily disposed of on the merits by this Court or by remand to the state courts in view of respondent Anderson's holding of said office to be totally defenseless in law.

Respectfully submitted,

William L. Fisher, Esq.
Attorney at Law
Relator in pro per
1051 Naughton St. #202
Troy, Michigan 48084